MOTORCYCLE HELMETS AND THE CONSTITUTIONALITY OF SELF-PROTECTIVE LEGISLATION

The New York legislature, in 1966, passed a law requiring all motorcycle drivers and passengers to wear protective crash helmets while operating or riding their vehicles.[1] Several other states immediately followed suit.[2] By July, 1967, the helmet requirement had achieved the status of a federal "minimum standard" to which all state highway safety programs were to conform.[3] It has practically become a nationwide requirement.[4]

Since their enactment, these helmet statutes have been challenged in one form or another in at least 14 different jurisdictions, usually without success.[5] This of course is, at first glance, a predictable result, since the regulation of traffic on public highways has traditionally been viewed as one of the cornerstones of a state's police power.[6] Perhaps, in light of the general subject matter involved, it is a little surprising that the assault against these statutes has succeeded at all. Yet no less than 9 decisions[7] have been rendered in favor of the cyclists, a fact which, standing alone, might make this a noteworthy controversy.

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1 N. Y. VEH. & TRAF. LAW § 381(6) (McKinney Supp. 1968-69).

2 *E.g.*, MICH. COMP. LAWS ANN. § 257.658(d) (1967), originally enacted July 11, 1966; MASS. GEN. LAWS ANN. ch. 90, § 7 (Supp. 1968), enacted Feb. 21, 1967.

3 *National Uniform Standards for State Highway Safety Programs*, H. R. Doc. No. 138, 90TH CONG., 1ST SESS. 3-4 (1967) [Hereinafter cited as H. R. Doc. No. 138, 90-1].

4 *See* notes 20 and 21, *infra.*

5 *See* cases cited notes 7, 10, 19, 75 and 77, *infra.* The other three jurisdictions where the question has arisen are: State v. Edwards, No. 582370 (Minneapolis Mun. Ct., Aug. 10, 1968); South Dakota Dealers Ass'n v. Parker, letter opinion of F. G. Dunn, Circuit Judge of 2d Jud. Cir., S.D., dated Oct. 17, 1967; and Bisenius v. Karns, No. 124423 (Dane County Cir. Ct., Wis., May 14, 1968).

6 Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959), South Carolina v. Barnwell Bros., 303 U.S. 177 (1938).

7 Everhardt v. New Orleans, 208 So. 2d 423 (La. App. 1968), *rev'd.*, — La. —, 217 So. 2d 400 (1968); American Motorcycle Ass'n v. Davids, 158 N.W.2d 72 (Mich. App. 1968), *but see*, note 98, and accompanying text, *infra.* 1966 N. M. Att'y Gen. Rep. 19 (No. 66-15); People v. Smallwood, 52 Misc. 2d 1027, 277 N.Y.S.2d 429 (1967); People v. Carmichael, 53 Misc. 2d 584, 279 N.Y.S.2d 272, *rev'd.*, 56 Misc. 2d 388, 288 N.Y.S.2d 931 (1968); State v. Babbs, No. 80-330 (Martin County Ct., Fla., Sept. 6, 1968) following State v. Eitel, No. 68M-7013, -7014, -7234 (Magis. Ct., Palm Beach County, Fla. Aug. 27, 1968); Seattle v. Zektzer, (Seattle Mun. Ct., undated); People v. Duncan, No. 44835 (Wayne County Cir. Ct., Mich. 1967).

But of greater import in these cases is the judicial treatment being accorded to the central issue—the validity of self-protective legislation. The cyclists have contended that the sole purpose of the helmet requirement is to compel a certain class of individuals to minimize their own risk of injury, and that no other member of the non-cycling public can possibly be affected in any material way by the statutes' enforcement. This being so, no discernible, commonly accepted public interest is served by this legislation. Further, in a nation where individuality is deemed an important, if not the ultimate value, the individual is, or ought to be, free to conduct himself according to his own personal dictates, unless that conduct so interferes with the interests of another as to justify legislative intervention. Thus, without establishing the existence of such a recognized public need, state legislatures are simply lacking in authority to act on behalf of the "general welfare."[8] In short, so the cyclists contend, self-protective laws are *ultra vires.*

As might be expected, this does not comport with constitutional doctrine as the states view it. They have responded with a familiar argument—the presumption of constitutionality attending any police power regulation. The legislatures alone have the power to decide what the public interest demands, and their judgment must be upheld if ". . . any state of facts, either known or which could reasonably be assumed, affords support for it."[9] Moreover, no "specific" constitutional prohibition has been transgressed by the helmet statutes, nor has any allegation of such been made. And to these points, the three supreme courts which have ruled on the matter have agreed.[10] Yet for several reasons, this presumption of constitutionality response does not appear wholly adequate to answer the cyclists' objection, especially in the factual context of this particular litigation.

It is suggested that the issue involved herein, self-protective regulation, is somewhat novel and merits more than a cursory reference

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8 Brief for Plaintiffs and Appellants at 4, American Motorcycle Ass'n v. Davids, 158 N.W.2d 72 (Mich. App. 1968) [Hereinafter cited as A.M.A. Brief in Davids]; Brief for Appellees as Amicus Curiae at 3, Everhardt v. New Orleans, — La. —, 217 So. 2d 400 (1968) [Hereinafter cited as Amicus Brief in Everhardt]. Note that the term "cyclists," as used in this article, refers to the position taken by the American Motorcycle Ass'n in the aforecited cases.

9 United States v. Caroline Products Co., 304 U.S. 144, 154 (1938).

10 State ex rel. Colvin v. Lombardi, — R.I. —, 241 A.2d 625 (1968); Commonwealth v. Howie, — Mass. —, 238 N.E.2d 373; *cert. denied,* 89 Sup. Ct. 485 (1968), Everhardt v. New Orleans, — La. —, 217 So. 2d 400 (1968).

to the language usually employed in police power cases. For the objection raised by the cyclists touches on what is perhaps the most *fundamental* of legal issues—man's relation to the state. If it is determined that the state has the inherent power to force an individual, on pain of criminal sanctions, to protect himself against potential harm arising in his everyday activity, then a more detailed analysis of this power seems appropriate. The very basis for the authority to regulate in this area, and its possible implications, ought to be explored. As a start in this direction, this article will attempt to identify the nature of the problem as it is presented in the helmet cases, and the possible interests asserted by both sides to the dispute.

I. Background and Purpose of the Helmet Requirement

1966 was a year of considerable agitation over the rising slaughter on public highways. In 1965, it is estimated that over 49,000 people lost their lives in traffic accidents throughout the nation.[11] Furthermore, with 1,500,000 disabling injuries and about 8.5 billion dollars in property damage recorded,[12] the cost to the American people in lost wages, in medical bills, and especially in personal tragedy was incalculable. The call for legislative action to reduce this mounting toll was clearly in order.[13]

Congress responded with the "Highway Safety Act of 1966,"[14] which directed each state to have a highway safety program designed to reduce the deaths and injuries resulting from traffic accidents.[15] This Act authorized 100 million dollars per year in federal appropriations to aid the states in carrying out these programs and provided that such were to be implemented no later than January 1, 1969.[16] In addition, it also specified that 10% of the funds normally apportioned to each state would be deducted if that state failed to comply with the uniform standards established by the Secretary of Commerce [now Secretary of Transportation].[17] As part of the overall scheme, each state was to institute a motorcycle safety program

11 2 U.S. Code Cong. & Ad. News, 2741, 2743 (1966); *Motor Vehicle and Highway Safety Acts of 1966 with Explanation*, CCH Prods. Liability Rep. No. 86, ¶ 1 (Extra ed., Sept. 12, 1966) [Hereinafter cited as *Fed. Safety Acts of 1966*, CCH Rep.]

12 *Id.*

13 Materials cited note 11, *supra.*

14 80 Stat. 731, 737 (1966).

15 80 Stat. 731 (1966), 23 U.S.C.A. § 402(a) (Supp. 1967).

16 *Id.* § 402(c) ($100 million was authorized for fiscal years ending in 1968 and 1969).

17 *Id.*

and, particularly, to require, as a "minimum," that ". . . protective safety equipment for drivers and passengers . . . be worn, [including] . . . an approved safety helmet and eye protection when . . . operating [a] vehicle on streets and highways."[18] Hence, each state was presumably obligated to pass such a law to remain qualified for all the federal grants available under this program.[19] Apparently in order to conform to these provisions, some 36 states have now enacted motorcycle helmet statutes; of these, 13 have also included a specific face shield or goggle requirement.[20]

To intimate that this standard was imposed upon the states, however, would be misleading. The uniform standards were to be ". . . developed in cooperation with the states"[21] and the need for motorcycle safety generally was widely felt, as indicated by the background information in the Secretary of Transportation's report.

> Deaths and injuries from motorcycle accidents doubled between 1963 and 1965. This fact is particularly *alarming* when it is understood that most of those killed and injured were young people under the age of 25. Motorcycle registrations have jumped from 574,080 in 1960 to 1,914,700 in 1966. By 1970 the annual increase is expected to reach 1 million per year. Motorcycle safety takes on *grave dimensions* in view of the fact that since 1960 the rate of motorcycle fatalities has increased at about the same rate as the number of motorcycles [*i.e.* almost 3½ times in 6 years] [Emphasis added.][22]

Thus, the helmet requirement itself was most probably incorporated in the federal standards on the recommendation of several states. New York's statute, enacted on August 2, 1966, before the Highway Safety Act became law, was passed at the request of its own Department of Motor Vehicles following an extensive review of the problem.[23] Its statistics on the subject are equally impressive.

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18 H. R. Doc. No. 138, 90-1 at 4 (Standard No. 3 of the 13 original minimum standards promulgated by the Secretary of Transportation on June 27, 1967, pursuant to § 203 of Pub. L. 89-564, 80 Stat. 731, 736 (1966)).

19 Fla. Stat. Ann. § 317.981 (1968) actually refers to the "1966 national highway safety act"; *see also*, Everhardt v. New Orleans, — La. —, 217 So. 2d 400 (1968) and Hutchinson v. Silvey, No. CR 8081 (Dist. Ct. of Reno County, Kan., Dec. 11, 1968) suggesting that compliance with the federal standard was probably the motivating force behind passage of those laws.

20 Cycle Buyer's Guide 138 (1968).

21 23 U.S.C.A. § 402(e) (Supp. 1967).

22 H.R. Doc. No. 138, 90-1, at 3 ("Background" for standard No. 3).

23 N.Y. Session Laws 2961 (McKinney, 1966); *see also*, statutes cited note 2, *supra*, which were enacted prior to the promulgation of the federal standards.

> . . . A Summary of the Department statistics indicates that 89.2% of the motorcycle accidents result in injury or death and that almost all fatalities occurring as a result of such accidents involve head injuries. Most of these fatalities could have been avoided, or the severity lessened, by the use of a proper helmet.[24]

The data clearly supports the legislative judgment that motorcycling is not only far more dangerous than driving an automobile, but that it is also much more likely to lead to serious head injury.[25] The New York commission which studied the matter concluded that its bill ". . . should go far in protecting the drivers and passengers on motorcycles."[26]

Some cyclists, on the other hand, doubt the appropriateness of the legislative response. The helmets, they maintain, tend to obstruct their hearing and peripheral vision, and the face shields tend to collect moisture and "fog up"; the whole apparatus is generally distracting.[27] They assert that, despite what the evidence tends to show, helmets may actually contribute to more accidents, due to their obstructive qualities, and thereby negate any alleged decrease in risks associated with their use. This argument of course is factually debatable and, therefore, bears only on the "reasonableness" of the regulation. That is, it casts doubt only on whether the legislative means selected, helmets, actually promotes the police power goal of safety. Without more, the legislative judgment on this particular should clearly control, in accordance with traditional notions of constitutional law.[28] But that does not dispose of the matter here.

II. The Problem of the Public Evil

The more difficult question in the helmet litigation is the identification of precisely what constitutes the public evil to be remedied. It is perhaps this feature which gives the dispute its "unique

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24 *Id.* at 2962.

25 "Michigan State Police datum 1962-66 (Exhibit A) shows a mortality rate of 11.5 for 10,000 registrations of motorcycles, as compared with 5.2 per 10,000 for all vehicles in the same period." American Motorcycle Ass'n v. Davids, 158 N.W.2d 72, 75, n.9 (Mich. App. 1968). However, this figure is not reflective of the total statewide picture since ". . . accidents which occurred in cities over 25,000 population [were] not included in this summary," Brief for Defendants and Appellees in Exhibit A, American Motorcycle Ass'n v. Davids, *supra.*

26 N.Y. Session Laws 2961 (McKinney, 1966).

27 Amicus Brief in Everhardt at 1.

28 Railway Express Agency v. New York, 336 U.S. 106, 110 (1949). *See also* text accompanying note 34, *infra.*

legal character."[29] The argument centers not so much on policy, *i.e.*, whether a public evil exists at all, nor on the method chosen to cure it, but more specifically on how others are hurt by the activity proscribed. The distinction warrants articulation.

A. *Police Power Requirements and the Helmet Law*

The "police power" of a state is usually described as the broad, inherent power of the legislature to prescribe regulations which promote the education, health, safety, peace, morals, and general welfare of the community.[30] Accordingly, in order to implement this power,

> . . . a large discretion is necessarily vested in the legislature to determine, not only what the interests of the public require, but what measures are necessary for the protection of such interests [citations omitted]. To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose. . . .[31]

The large majority of police power cases ostensibly deal with the second requirement expressed, *i.e.*, whether the means selected reasonably relates to and advances any of the traditional police power ends. This of course is the familiar constitutional standard of "reasonableness" which due process demands of all legislation.[32] In the instant problem, except as noted above, there is little serious controversy over this requirement. The cyclists themselves concede that the method chosen, requiring helmets, promotes valid legislative goals of minimizing personal injury and enhancing safety.[33] And undoubtedly, it meets the standard usually employed in such cases, *i.e.*, where ". . . 'debatable questions as to reasonableness are not for the courts, but for the Legislature' . . . ."[34] As to the first re-

29 A.M.A. Brief in Davids at 3, Amicus Brief in Everhardt at 3.

30 Barbier v. Connolly, 113 U.S. 27, 31 (1885), Mugler v. Kansas, 123 U.S. 623, 658 (1887).

31 Lawton v. Steele, 152 U.S. 133, 136-37 (1894), described in Goldblatt v. Hempstead, 369 U.S. 590 (1962) as the "classic statement of the rule" of "reasonableness," although "even this rule is not applied with strict precision." *Id.* at 594, 595.

32 Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

33 A.M.A. Brief in Davids at 4.

34 Goldblatt v. Hempstead, 369 U.S. 590, 595 (1962) [Citation omitted]. *See also*, Railway Express Agency v. New York, 336 U.S. 106 (1949).

quirement, however, legislative compliance is not altogether certain. It is this aspect on which the debate focuses.

As stated previously, the express purpose of the helmet statutes is self-protection of the individual from potential injury;[35] that is to say, the effect intended is to compel each cyclist to take precautionary measures which reduce the *risk of possible harm to himself.* If this is admittedly the sole purpose and effect of the regulation, then how, the cyclists ask, does it appear that "the interests of the public generally . . . require such interference"[36] with their conduct? They question not the legislative prerogative of determining what the public needs, but only the authority to act when the public does not need it. Thus, according to their view, it is essential for the government to establish that other members of the public at large are affected in some deleterious manner by a prospective defendant's activity before that activity may be regulated. In other words, the existence of an ascertainable *public need* for a particular statute is a mandatory precondition to the exercise of the police power. And, indeed, the classic statement on the subject does seem to imply such a requirement. Hence, in these cases, the issue should be framed in terms of how the non-cyclist is affected by the cyclist's failure to comply with the statute. Only if the non-cyclist is affected, say the cyclists, is there a public evil to regulate; without it, the legislature has no power to act.

At this juncture, one may well wonder how novel this claim really is, and how much it differs from the "reasonableness" standard traditionally employed. It must be acknowledged that "reasonableness" is a comprehensive label for various techniques. Without attempting to delve into an extensive review of the subject, a brief synopsis on the origin of the cyclists' theory and a few examples of its connection to the present standard may suffice to illustrate just how flexible that term can be.

The cyclists' thesis is not new. It is one of those ideas which is deeply ". . . rooted in the traditions and conscience of the [English speaking] people. . . ."[37] It originated in the political theory of the social compact, an idea widely embraced by the Founding Fathers.[38]

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35 *See* text accompanying notes 22 and 26, *supra.*

36 *See* cases cited note 31, *supra.*

37 Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *See also,* Adamson v. California, 332 U.S. 46 (1947) (Frankfurter, J., concurring); Rochin v. California, 342 U.S. 165 (1952).

38 *See,* MacIver, *European Doctrines and the Constitution,* and Bainton, *The Appeal to Reason and the American Constitution,* in THE CONSTITUTION RECONSIDERED

"Natural man," in forming an organized society, was thought to have relinquished *some* of his naturally endowed, individual rights for the common good. In doing so, he still retained certain "inalienable rights:" those unessential for the common weal and those indispensable to "liberty" as the 18th century thinkers viewed it. These rights were immune from governmental interference.[39] Many of them were to become indelibly inscribed in the federal and state constitutions.[40]

The subsequent fate of this idea, as a theory of government, is familiar constitutional history. From *Lochner v. New York*[41] in 1905 to *Nebbia v. New York*[42] in 1934, the Supreme Court frequently used the doctrine of "natural justice" to substitute its own views for that of Congress and the state assemblies.[43] The widespread reaction against the Supreme Court in the early depression for invalidating New Deal legislation completely discredited this concept in constitutional adjudication.[44] After *Griswold v. Connecticut*,[45] which presages a possible revival, its future has become uncertain.[46]

This article purports to be neither a call for the revival of natural justice, nor, obviously, an extensive review of the doctrine of the social compact. Suffice it to say, however, the argument seems particularly appropriate in the factual context of this litigation. Citing the

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51, 121 (Read ed. 1938); Hogan, *The Supreme Court and Natural Law*, 54 A.B.A.J. 570 (1968) [Hereinafter cited as Hogan, 54 A.B.A.J. 570]; Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 365, 380-409 (1929); Van Loan, *Natural Rights and the Ninth Amendment*, 48 B.U.L. REV. 1 (1968) [Hereinafter cited as Van Loan, 48 B.U.L. REV. 1]. *See also*, Calder v. Bull, 3 U.S. (3 Dall.) 386, 387-88 (1798) (Chase, J.) for an early judicial expression of this view.

39 *See* authorities cited note 38, *supra.*

40 *See* authorities cited note 38, *supra. See generally* Ratner, *The Function of the Due Process Clause*, 116 U. PA. L. REV. 1048 (1968). [Hereinafter cited as Ratner, 116 U. PA. L. REV. 1048].

41 198 U.S. 45 (1905).

42 291 U.S. 502 (1934).

43 WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 154 (1942).

44 McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial* 1962 SUP. CT. REV. 34, 36-40; Emerson, *Nine Justices in Search of a Doctrine*, 64 MICH. L. REV. 219, 223-25 (1965) [Hereinafter cited as Emerson, 64 MICH. L. REV. 219]; Hogan, 54 A.B.A.J. 570, 571; Ratner, 116 U. PA. L. REV. 1048, 1050-75.

45 381 U.S. 479 (1965).

46 *Compare* Emerson, 64 MICH. L. REV. 219, *and* Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy?* 64 MICH. L. REV. 197 (1965) [Hereinafter cited as Dixon, 64 MICH. L. REV. 197] *with* Kauper, *Penumbras, Peripheries, Emanations, Things Fundamental and Things Forgotten: The Griswold Case*, 64 MICH. L. REV. 235 (1965) [Hereinafter cited as Kauper, 64 MICH. L. REV. 235]. *See generally*, Ratner 116 U. PA. L. REV. 1048, 1050-75.

ancient maxim of the civil law, *sic utere tuo ut alienum non laedas*,[47] and relying mainly on the works of John Stuart Mill,[48] the cyclists contend that since the individual conduct proscribed—not wearing a helmet—could not possibly harm another in any immediate, realistic manner, then the cyclist should be free to act according to his own discretion and to select his own protective apparel. At a minimum, there ought to be some limit on governmental power to intervene into a person's affairs, under the guise of promoting the "general welfare," when no one else is really threatened thereby. And this should be so, notwithstanding the absence of any specifically enumerated constitutional prohibition. The idea almost seems to paraphrase Justice Chase's opinion in *Calder v. Bull*.[49] Yet it appears much more persuasive here than in the economic Due Process cases. In many of the latter, the pre-*Nebbia* court failed to fully appreciate the nature of the injury to others. Given the economic views of that era, those justices were unable to accept the rationale behind unionism and collective bargaining; they were unable to appreciate the impact that one employee's wages or working conditions could have on another's. And perhaps they had other reasons. By contrast, the direct effect on the public at large when an unhelmeted rider takes to the highway is not so readily apparent, as will become evident. In any event, it must be noted that there was, at one time, considerable judicial support for the position urged by the cyclists.

The history of due process is important not only in showing the theoretical basis for the cyclists claim, but also in understanding the varied techniques encompassed by that doctrine. The following three illustrations may demonstrate its flexibility.

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47 "So use your own as not to injure that of another" 39 WORDS AND PHRASES 335-338 (West ed. 1953).

48 J. MILL, UTILITARIANISM, LIBERTY AND REPRESENTATIVE GOVERNMENT 131-149 (E.P. Dutton & Co. ed. 1925); sample:

> As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

Id. at 132.

49 3 U.S. (3 Dall.) 386, 387-88 (1798). *See also*, FREUND, THE POLICE POWER, PUBLIC POLICY, AND CONSTITUTIONAL RIGHTS § 155 at 141-43 (1904 ed.).

For one, when the penalties imposed by a statute are severe and the policy being advanced is dubious or interferes with protected liberties, the courts often switch to the "performance" standard intimated in *United States v. Caroline Products Co.*[50] In these instances, the government must show a "compelling interest" in the policy, and must demonstrate that a "less drastic" means of achieving its objective is unavailable.[51] This technique is also routinely applied in zoning cases.[52] But no suggestion has been made that such a technique would be appropriate here.

Also, whether courts are willing to acknowledge it or not, the "reasonableness" standard is still infrequently employed to invalidate the policy itself. The most recent publicized example of this was *Griswold v. Connecticut.*[53] However one may view the basis for that decision, this element was certainly an important consideration in each of the *Griswold* opinions.[54] What is pertinent about *Griswold* here, however, is that few believed that the proscribed conduct —contraception—represented a public evil at all; on the contrary, it was an important individual and social benefit, one to be encouraged rather than suppressed.[55] No such sentiment is involved in the helmet cases. Few would seriously doubt the desirability of wearing a helmet and goggles while riding a motorcycle. The American Motorcycle Association even requires them in its own events.[56] The sole question is one of *legislative power to require it.*

Finally, another subject within the ambit of the "reasonableness" doctrine is that of "special legislation." This term refers to laws whose classifications are so narrowly circumscribed as to limit

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50 304 U.S. 144, 152-153, n.4 (1938).

51 Aptheker v. Secretary of State, 378 U.S. 500, 507-511 (1964) and cases cited; Griswold v. Connecticut, 381 U.S. 479, 497 (Goldberg J., concurring) and cases cited.

52 *Compare* Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) *with* Nectow v. Cambridge, 277 U.S. 183 (1928), rendered only 2 years after the famous decision in *Euclid.* The Supreme Court has generally left this task to the states, and has heard only one zoning case since *Nectow, i.e.,* Goldblatt v. Hempstead, 369 U.S. 590 (1962).

53 381 U.S. 479 (1965).

54 See Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (Black and Stewart JJ., dissenting); Emerson, 64 MICH. L. REV. 219.

55 Emerson, 64 MICH. L. REV. 219, n.2. The author (one of appellants' counsel) notes that the Roman Catholic Church did not oppose invalidation of Connecticut's birth-control statute; he also suggests that many members of the Connecticut legislature favored repeal but preferred to have the Supreme Court, rather than themselves, perform that task. *See also* McKay, *Right of Privacy: Emanations and Intimations,* 64 MICH. L. REV. 259, 280-281.

56 Amicus Brief in Everhardt at 1.

their applicability to one particular company within a regulated industry, or one city within a state, etc.[57] "Special legislation" was a common 19th century legislative device for dispensing with governmental privileges or for pursuing other constitutionally questionable objectives.[58] Today, most states have constitutional provisions which require all laws to have a "general operation," thereby prohibiting most forms of "special legislation."[59] Still, one of the underlying values behind the "means-ends" test is the elucidation and exposure of the specific goal being advanced. If the methodology of a statute is found to be promoting the interests of a particular class, as distinguished from those of the public generally, then, having failed to meet the rationality test, the goal is adjudged an impermissible one.[60] The equal protection clause is usually used to invalidate an arbitrary classification, but ". . . discrimination may be so unjustifiable as to be violative of due process."[61] This is in effect what the cyclists are asserting, but in a slightly variant form. Thus, it must be recognized at the outset that the approach suggested by the cyclists is not really novel, nor radically different from that traditionally employed in constitutional litigation.

But perhaps there is a difference. It may be but a difference in degree or in emphasis. The first courts which entertained this argument so viewed it.[62] As should become evident later, the argument does tend to accentuate the factual bases behind a regulatory measure in lieu of the nebulous assertions often made in comparable cases. It also tends to illuminate the interests that are really at stake in unfamiliar subjects, thus giving more specific content to the rationality test. Presumably, all legislative and executive action must promote

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57 WINTERS, STATE CONSTITUTIONAL LIMITATIONS ON SOLUTIONS OF METROPOLITAN AREA PROBLEMS 83-84 (1961).

58 Anderson v. Board of Commissioners, 77 Kan. 721, 95 p. 583 (1908), and cases cited; Winters, note 57, *supra*.

59 Winters, note 57, *supra*, at 84-86. *E.g.*, IND. CONST. ART. IV, § 23, ". . . in all other cases where a general law can be made applicable, all laws shall be general, and of uniform operation throughout the state."

60 *Compare* Slaughter-House Cases, 16 Wall. (83 U.S.) 36 (1873) *and* Walnut Creek v. Silveira, 47 Cal. 2d 804, 306 P.2d 453 (1957), *with* Morey v. Doud, 354 U.S. 457 (1957).

61 Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The relationship between due process and equal protection has only recently been articulated. Note, *Scope of the Right to Aid Other Than Counsel*, 29 OHIO ST. L.J. 984, 986-93 (1968) and cases cited; Van Loan, 48 B.U.L. REV. 1, 32-33.

62 Mugler v. Kansas, 123 U.S. 623 (1887); Territory v. Ah Lim, 1 Wash. 156, 24 P. 588 (1890). These are perhaps the only cases which fully treat the question as presented in the helmet cases.

broad social purposes. Once courts focus on the injury to others resulting from the prohibited conduct, they will more readily perceive the social need for such a measure. If none is readily apparent and cannot be adequately demonstrated, then the governmental action must be "irrational" or otherwise impermissible. Hence, the approach suggested, although perhaps but a restatement of the traditional reasonableness test, is a most useful one in this type of litigation. The matter deserves consideration. Therefore, in order to fully appreciate the cyclists' claim, the non-cycling public's need for the helmet law must first be identified.

B. *The "Missile Hazard" Theory*

A number of courts, it must be acknowledged, have ruled on the basis of an alleged direct benefit to the public. They have asserted that other motorists are affected by the statutes' operation. The Supreme Court of Rhode Island, in a brief opinion, upheld that state's helmet law on such a ground.

> It does not tax the intellect to comprehend that loose stones on the highway kicked up by passing vehicles, or fallen objects such as windblown free branches, against which the operator of a closed vehicle has some protection, could so affect the operator of a motorcycle as to cause him momentarily to lose control and thus become a menace to other vehicles on the highway.[63]

Other than applying the presumption of constitutionality, this was the extent of its analysis. The Supreme Judicial Court of Massachusetts followed this rationale without further elaboration.[64] In *Everhardt v. New Orleans*,[65] the Louisiana Supreme Court, in a more extensive review of the problem, cited this reasoning with approval. A slight variation on the same theme was put forth by a New York trial court.

> The old joke about the happy motorcyclist—"the one with the bugs on his teeth"—is not too funny when one hears or reads about instances where cyclists have been hit with hard-shelled beetles or bees and have lost control of their bikes, causing damage and injuries to others.[66]

If this factual assessment comes to be accepted by those who consider it, then of course, it is dispositive of the matter, having removed the

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63 State *ex rel.* Colvin v. Lombardi, — R.I. —, 241 A.2d 625, 627 (1968).

64 Commonwealth v. Howie, — Mass. —, 238 N.E.2d 373, *cert. denied*, 89 Sup. Ct. 485 (1968).

65 — La. —, 217 So. 2d 400 (1968).

66 People v. Bielmeyer, 54 Misc. 2d 466, 469, 282 N.Y.S.2d 797, 800 (1967).

very foundation on which the cyclists' argument rests. As an approach to dealing with other self-protective laws, however, it has several inherent weaknesses, some of which should be mentioned.

One difficulty with the above rationale is that it lacks cogency. The cyclists simply do not believe it; they consider it patently unrealistic.[67] They point out that it represents nothing more than judicial notice of a subject about which most judges have little knowledge or experience. They also note that those who proposed the helmet had never intended any other effect but the stated one—self protection. If the legislatures had this purpose in mind when the requirement was enacted, they definitely omitted any reference to it in their materials. Further, if the legislature was really concerned about the deflection of "missile hazards," *i.e.*, insects, wind-carried debris, etc., then logically they misconceived their remedy. Goggles would have been a far more obvious and effective deterrent against flying objects than the helmets, yet only a third of the states have included a face shield requirement.[68] Also compare the rebuttal offered by Judge Barham in *Everhardt v. New Orleans:*

> I cannot determine how the wearing of a helmet by a motorcyclist can be conducive to the safer operation of his motorcycle. He is as accident-prone with as without the helmet in regard both to himself and to other motorists. Certainly an unhelmeted motorcyclist presents no increased danger to the rest of the motoring public. The most that can be said to support the insistence upon the wearing of the helmet is . . . [the] conclusion that the helmet may mitigate the cyclist's injury after the fact, after the accident, after the breach of safety.
>
> . . . .
>
> . . . [I]t is reasoned that because of less body protection motorcyclists are "more susceptible to be injured and cause other injuries." Only the assumption that they are more susceptible to injury has validity in my mind and then not to a certainty. The assumption that the motorcyclist's lack of body protection makes *other highway users* more likely to be injured appears to be without foundation or logic. I can find no basis for concluding that helmeting or even armouring our motorcyclists would cause fewer injuries to *others*. [Emphasis added.]

The ordinance is simply an attempt to force one class of

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67 A.M.A. Brief in Davids, Reply Brief, at 4.

68 *See*, note 20, *supra*. The court in *Davids* pointed out that a ". . . windshield requirement imposed on the manufacturer would bear a reasonable relationship to the objective [if missile hazards were really the objective] and not vary from the norm of safety legislation customarily imposed on the manufacturer for the protection of the public. . ." American Motorcycle Ass'n v. Davids, 158 N.W.2d 72, 75 (Mich. App. 1968).

> persons to mitigate or minimize their own injuries resulting from accident without regard to causation of the accident or general highway safety.[69]

Hence, as a factual matter, the "missile hazard" theory does not appear to be an overly persuasive application of the "reasonableness" standard, regardless of one's view of that test. Unless some factual evidence supporting this view can be obtained, it must be characterized as a ". . . strained effort to justify what is admittedly wholesome legislation."[70]

Moreover, this type of safety measure has few analogues. Most traffic laws are primarily designed to keep one person from hurting another: if one drives at an excessive speed, he may lose control and collide with another motorist, or he may not be capable of stopping in time to avoid a pedestrian in a cross walk; if he runs through a red light, a similar fate may befall him. Thus experience tells the person subject to these laws that obedience minimizes the risk of harm to all road users. In addition, most other types of safety regulations, the "public welfare offenses," are usually directed at the manufacturer, seller, and employer for the protection of others, *i.e.*, the consumer, the worker, and the public at large.[71] Although now enforced by means of criminal sanctions, many of these offenses were long ago recognized as tortious conduct and were indirectly deterred by means of strict civil liability.[72] Consequently, these too are well understood and appreciated by those to whom they apply. Even in

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69 Everhardt v. New Orleans, — La. —, 217 So. 2d 400, 404 (1968) (Barham, J., dissenting).

70 American Motorcycle Ass'n v. Davids, 158 N.W.2d 72, 75 (Mich. App. 1968).

71 Morissette v. United States, 342 U.S. 246 (1952) eloquently described these laws as follows:

> The industrial revolution multiplied the number of workmen exposed to injury from increasingly powerful and complex mechanisms, driven by freshly discovered sources of energy, requiring higher precautions by employers. Traffic of velocities, volumes and varieties unheard of came to subject the wayfarer to intolerable casualty risks if owners and drivers were not to observe new cares and uniformities of conduct. Congestion of cities and crowding of quarters called for health and welfare regulations undreamed of in simpler times. Wide distribution of goods became an instrument of wide distribution of harm when those who dispersed goods, drink, drugs, and even securities, did not comply with reasonable standards of quality, integrity, disclosure and care. Such dangers have engendered increasingly numerous and detailed regulations which heighten the duties of those in control of particular industries, trades, properties or activities that affect public health, safety or welfare.

Id. at 253-254.

72 *Id.*

the closely related area of health regulations, where the one on whom the onus is laid is forced into taking self-protective action, the benefit to others is readily perceptible. For example, in *Zucht v. King*,[73] the complainant had been ordered to submit to a compulsory vaccination in order to remain in school. Without such an inoculation, both she and the other students might be susceptible to infection, owing to the contagious nature of small-pox. Numerous other examples could be cited. But in the helmet cases, unlike the above, the onus falls on the only one ostensibly benefited by the statute's enforcement. Hence, if there is an indirect, but nonetheless identifiable public interest involved, then it ought to be clarified for him to whom the statute applies.

III. The Interests of the State

When the states have actually been called upon to demonstrate the harm to the public at large, they have been hard pressed to adequately respond. Most have merely emphasized the broad, inherent powers of the legislature and the applicability of the presumption of constitutionality. Some have contended that driving on a public thoroughfare is only a "privilege," not a "right," and therefore the legislature should have more latitude in prescribing appropriate rules.[74] While this is undoubtedly true as a general matter, it really does not answer the question, as the cyclists have framed it. Further, no state has contended that traffic regulations are exempt from due process requirements. In addition, a few states have asserted that liability insurance rates would increase without the statute, as personal injuries tend to be more severe.[75] The short answer to this, though, is that the defense of contributory negligence is always available to a tortfeasor charged with hitting a cyclist. Also, since there are many, varied actuarial factors which contribute to the cost of liability insurance, the "helmet factor" would hardly be a significant cost item to most non-cycling, insured motorists.[76] In sum, none of these assertions really identify any interest that the statutes serves.

Of all the arguments put forward by the state, only two appear to have any realistic content: (1) the asserted interest in the "viabil-

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[73] 260 U.S. 174 (1922).

[74] Everhardt v. New Orleans, — La. —, 217 So. 2d 400 (1968).

[75] Brief for Defendants and Appellees at 8, American Motorcyle Ass'n v. Davids, 158 N.W.2d 72 (Mich. App. 1968) [Hereinafter cited as State's Brief in Davids]; State v. Anderson, 164 S.E.2d 48, 51 (N.C. App. 1968).

[76] *Cf.* data presented in note 78, *infra.*

ity" of the citizen[77] and (2) the interest in solving any "alarming" problem which reaches such "grave dimensions" that it threatens the very fabric of society. Both of these claims are really facets or restatements of the same thing—the interest of the public in its own preservation and productivity. Few would disagree with this as a general matter. All laws are presumably directed toward this goal. The difficulty, though, arises when one attempts to use it as a justification for a specific law. It becomes an exceedingly complex argument, so much so that it has rarely been made. Notwithstanding the difficulties, the merits of this contention need to be explored in some detail, especially since it has been urged as a ground for upholding the helmet law.

A. *The Welfare Cost Approach*

Like the liability insurance rate argument mentioned earlier, this approach is based on welfare costs. When a cyclist suffers a disabling head injury, his ability to support himself is markedly diminished and he therefore becomes a burden on the state. He not only ceases to contribute to the resources of the state, but he also becomes another addition to the already overloaded welfare rolls. And in an era of great public clamor over the high costs of public welfare, the inferences one may draw to jump to this conclusion are practically irresistible. But the logical validity of these inferences ought to be scrutinized further, and, to do this, the proposition should be phrased in quasi-syllogistic form. Thus the proposition may be stated: any measure, or most measures, which tend to reduce welfare costs are, unless specifically prohibited, justifiable exercises of the police power; the helmet requirement does reduce these costs and therefore it must be valid. As a practical matter, the assertion rests on rather uncertain grounds.

For one, many who ride motorcycles are probably more than capable of financing their own rehabilitation; yet they are neither exempt from the statute's application, nor are they likely to become welfare recipients. Also, proof of medical insurance as a prerequisite to registering a motorcycle could be an alternative, more acceptable,

[77] State's Brief in Davids at 5-7; State v. Mele, 103 N.J. Super. 353, 247 A.2d 176 (1968); *See also*, suggestion in West Coast Hotel v. Parrish, 300 U.S. 379, (1937):

> The State still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety and welfare are sacrificed or neglected, the State must suffer.

Id. at 394.

way of dealing with the problem. Further, no one has yet to exhibit data which suggests that injured cyclists significantly add to the welfare rolls. True, cycling is more dangerous than automobile driving, but it probably does not affect welfare costs so out of proportion to the numbers involved that special coercive regulation is needed. Thus, a limiting feature of this argument is that all human activity increases the danger of physical harm to the individual; however, only a relatively few who are actually disabled ever end up on welfare.[78] Most welfare costs stem from other far more serious social problems. Perhaps only when the percentage of welfare recipients attributable to those actually disabled in cycling accidents reaches "alarming" proportions will this be a very persuasive justification for the helmet requirement.

A more serious disadvantage of this argument is that it knows no bounds. It can be used to justify almost anything. All laws are passed to "preserve the state," even unconstitutional ones. To say that those entrusted with the government of the states were actually worried about the number of gainfully employed carpenters, lab technicians, salesmen, etc., and therefore passed *this specific statute* proves to be a little too much. The same justification has been used for many years to uphold vagrancy laws and other like measures.[79] And, as many courts and commentators have amply demonstrated, this argument is really a euphemistic facade for other, unstated reasons.[80] If the legislators were seriously concerned about labor shortages, then all the public discourse on overpopulation, birth control, and unemployment is grossly misconceived. This is not to dispute

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78 Of the 10,800,000 accidental injuries (total disabilities) which occurred in 1966, the last date for which figures are available, only 400,000 resulted in "permanent impairments"; of these 400,000, 160,000 were attributed to *motor vehicle* accidents. Since motor vehicles outnumber motorcycles about 45 to 1 (90 million to 2 million) probably no more than 4,000 "permanent" disabilities per year occur as a result of motorcycle accidents; hence, this cannot be a significant contributing factor in welfare costs. *World Almanac* 895 (Newspaper Enterprise Ass'n Inc., ed. 1968) (Statistics compiled by U.S. Dept. of Health, Education, and Welfare) [Hereinafter cited as 1968 *World Almanac*]. *See also*, note 103, *infra*.

79 *See*, Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1965); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, etc.*, 3 CRIM. L. BULL. 205 (1967); Fenster v. Leary, 20 N.Y.2d 309, 299 N.E.2d 426, 282 N.Y.S.2d 739 (1967).

80 *E.g.*, *see*, Advisory Committee Comments to MINN. STAT. ANN. § 609.725 (Vol. 40A, at 68, 1964) (conclusion: "This is undoubtedly a crude device for getting at a very deep social problem and consists of little more than attempts at repression rather than solution." *Id.* at 69). *See also*, materials cited, note 79, *supra*.

the salutory effect of the helmet requirement or impugn legislative motives; it is to say, though, that the "effect on welfare" argument is far too remote a public benefit to justify the application of *criminal* sanctions to this particular activity.

B. *The "Analogical" Approach*

This approach, called the "analogical" one for lack of a better term, is a traditional legal process for evaluating an unfamiliar subject. Relying heavily on this method, the states have cited several statutes which appear to have the same effect as the helmet requirement and which have consistently been sustained. These statutes deserve some comment.

Anti-suicide statutes in particular are cited as an example of a comparable law.[81] The state, so the contention runs, has such a high regard for human life that it will not suffer one to take his own. If a person attempts to kill himself but does not succeed, he is criminally liable. No other person is directly benefited by the operation of such statute, yet it is regularly upheld without debate. Thus, since there is no material difference between such statutes and the helmet requirement, *a fortiori,* the latter must be valid. Suicide laws, however, are hardly a stable basis for justifying this legislation. The thesis is untested. Very few cases, in point, have arisen in recent years.[82] Most references to anti-suicide statutes are either dicta or oblique assertions made by insurance companies attempting to invoke their suicide clauses.[83] The only recent cases which have considered the issue rely solely on 19th century precedent, wherein appear statements such as: "suicide is *malum in se*";[84] "[s]elf-destruction is against the law of God and man."[85] They hardly represent the penetrating analyses called for in today's secular world. Moreover, the

81 *E.g.*, State's Brief in Davids at 10.

82 Basically, with a few exceptions, the cases in notes 83-86 *infra* are the only reported cases on suicide laws.

83 *E.g.*, Commonwealth v. Root, 191 Pa. Super. 238, 156 A.2d 895 (1959); Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1,000 (D.C. Cir. 1964), *rehearing denied en banc.* 331 F.2d 1010 (D.C. Cir. 1964); Aetna Life Ins. Co. v. McLaughlin, 370 S.W.2d 229 (Tex. Civ. App. 1963); Liberty National Life Ins. Co. v. Cox, 98 Ga. App. 582, 106 S.E.2d 182 (1958).

84 State v. Willis, 255 N.C. 473, 475, 121 S.E.2d 854, 855 (1961). The court in *Willis* reviews the authorities, and concludes that, since attempted suicide was a crime at common law, and since the legislature had declared the common law in force in that state, suicide could be punished.

85 Wallace v. State, 232 Ind. 700, 701, 116 N.E.2d 100, 101 (1953). Note that this was the extent of the court's analysis.

cyclists could point to the fact that a significant number of states have refused to enact such statutes and for the very reason which the cyclists advocate.[86] Hence, a state is better off omitting this analogy.

Other comparable situations are frequently mentioned: auto seat belts, smoking, athletic activities, and the like. For example, in *Hutchinson v. Silvey*,[87] the court notes that a number of states have enacted laws which require the installation of seat belts in automobiles and which prohibit the operation of any vehicle not so equipped. It also cites several articles which argue that the failure to wear seat belts ought to be recognized as contributory negligence so as to prevent the plaintiff's recovery after an accident. From this, it concludes that "[s]uch principles might well apply to failure to wear a crash helmet while operating motorcycles."[88] Similar examples might be cited, but this one suffices to illustrate the main disadvantage of this group. They are untested. The similarities may prove to be illusory. The seat-belt example, for instance, appears to be more akin to a "public welfare offense" than the helmet requirement, as, in the former, the main burden is placed on the manufacturer rather than on the user. Different considerations apply. The cyclists themselves, for example, have tried to reinforce their position with the contention that the helmet requirement is, in effect, no different from a prohibition on smoking. While this analogy may suggest some of the implications of the helmet ruling as precedent, it too has never been subjected to judicial scrutiny. As a result, many of these arguments amount to little more than mere assertions and counterassertions.

Although seldom cited, certain "morality" laws, such as those prohibiting adultery, fornication, consensual homosexuality, and the like, are analogous in some respects. Except for *Griswold v. Connecticut*[89] and *Cotner v. Henry*,[90] these offenses are usually upheld without much discussion. Yet the same problem of ascertaining just how the public is harmed by the proscribed activity obtains here. That is to say, it is very difficult to perceive or appreciate how other members of society are threatened in any direct or material sense by the actors' conduct. Although these offenses are subjects of treatises in

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86 *See*, Annot., 92 A.L.R. 1180 (1934); Tate v. Canconica 180 Cal. App. 2d 898, 5 Cal. Rptr. 28 (1960).

87 No. CR 8081 (Dist. Ct. of Reno County, Kan., Dec. 11, 1967)

88 *Id.*

89 381 U.S. 479 (1965).

90 394 F.2d 873 (7th Cir. 1968).

themselves, observations contained in the commentary to the *Model Penal Code* are relevant in this regard and are worth repeating.

> Sexual intercourse outside the bounds of lawful matrimony is widely, but not universally, criminal in the United States. The law is directly traceable to Biblical and other religious sources.
> . . . .
> . . . [But] [t]he Code does not attempt to use the power of the state to enforce purely moral or religious standards. We deem it inappropriate for the government to attempt to control behavior that has *no substantial significance* except as to the morality of the actor.
> . . . Our proposal to exclude from the criminal law all sexual practices not involving force, adult corruption of minors, or public offense is based on the following grounds. No harm to the *secular interests of the community* is involved in atypical sex practice in private between consenting adult partners. This area of private morals is the distinctive concern of spiritual authorities. . . . Further, there is the *fundamental question* of the protection to which every individual is entitled against state interference in his personal affairs *when he is not hurting others.* [Emphasis added.][91]

As a consequence of this salient, and due to the complexity of this subject-matter, the states themselves have been reluctant to use these offenses as support for their view.

C. *A Possible Justification for the Helmet Requirement*

Despite the weaknesses in the position taken by the states, the fact remains that the aforementioned casualty rates may have reached "alarming" proportions. Congress and the states obviously so considered them. However, it must be noted that Congress and the states were primarily concerned with the overall annual figures and not with this specific requirement.[92] In fact, no specific reference to motorcycles can be found in the legislative materials in the 1966 federal safety laws. Also, these legislative bodies were primarily interested in establishing a comprehensive nationwide safety program, particularly in the areas of driver training, vehicle equipment and inspections, research, and so forth.[93] They were not considering specific standards.[94] It might also be noted that most of this legislation, like the public welfare offenses cited above, is ultimately directed at

91 MODEL PENAL CODE § 207, Comment, at 204, 207, 277-278 (Tent. Draft No. 4, 1955). [*Cf.* Stanley v. Georgia, 89 S. Ct. 1243 (1969)—Ed.]

92 *Fed. Safety Acts of 1966*, CCH REP. ¶ 1, 9.

93 *See*, 23 U.S.C.A. § 402(a) (Supp. 1967).

94 *Fed. Safety Acts of 1966*, CCH REP. ¶ 4.

either the manufacturer or the distributor, not the individual.[95] An exception to this perhaps is mandatory driver education,[96] but here the relation between the regulation and the public benefit is self-evident. If the individual is not qualified to drive, he is much more likely to collide with and injure others. Thus, it cannot be said that there is a strong *federal policy* behind this particular requirement. As far as the states are concerned, though, this may be another matter.

Several of the states do appear to view motorcycle injuries as a very serious problem. The Michigan legislature, after its original helmet statute was invalidated in *American Motorcycle Association v. Davids*,[97] reenacted a law which required all motorcycles to be ". . . equipped with, and carry when . . . being operated, a number of crash helmets equal to the number of drivers and passengers carried. . . ."[98] Thus, it in effect overruled the *Davids* decision. New York has also acted further in this area by prescribing detailed regulations on construction and equipment.[99] It is difficult to ascertain whether the other states feel likewise or whether they are merely complying with the federal standard.[100] Notwithstanding, it is probably accurate to say that the helmet requirement does represent a fairly important state policy. The subject discussed herein, however, is not so much on the importance of the policy, but on how the courts ought to treat it. For this is the significance of the helmet litigation.

When confronted with a statute of this sort, *i.e.*, a self-protective law, the court at least ought to deal with the legislative reasons suggested by the statute's drafters. If the statistics presented demonstrate the "grave dimensions" of the problem to be remedied, then the court ought to rule on that basis alone. If it is shown that a sizeable portion of the younger generation is being disabled by severe head injuries resulting from motorcycle accidents, then perhaps the state should prevail. But in so ruling, the court ought to realistically consider all the interests involved and the possible implications of the decision. Little is gained by invoking improbable "reasons" like

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95 *See, National Traffic and Motor Vehicle Safety Act of 1966*, 80 Stat. 718, 722, 724 (§ 108, 111) (1966).

96 *Fed. Safety Acts of 1966*, CCH REP. ¶ 4.

97 158 N.W.2d 72 (Mich. App. 1968).

98 MICH. COMP. LAWS ANN. § 257.658(d) (Supp. 1968) (amended June 12, 1968, by Pub. Act No. 141, 3 *Mich. Legislative Service* 248, 1968).

99 N.Y. VEH. & TRAF. LAW § 381(10) (McKinney Supp. 1968-69).

100 *E.g., see* note 19, *supra.*

the "missile hazard" theory or by a rote recital of the litany on the presumption of constitutionality. If a fresh doctrinal basis is needed to justify the measure, then it ought to be proposed. And the helmet cases may have provided such an opportunity.

A possible basis for upholding this law may be found in the tort law concept of "public necessity." Prosser defines this as a case "[w]here the danger affects the entire community, or so many people that the public interest is involved, that interest serves as a complete justification to the defendant who acts to avert the peril to all."[101] One helmet decision suggested this as a possible ground, even though it rested on the presumption.

> Death on the highway can no longer be considered as a personal and individual tragedy alone. The mounting carnage has long since reached proportions of a public disaster. Legislation reasonably designed to reduce the toll may for that reason alone be sufficiently imbued with the public interests to meet the constitutional test required for a valid exercise of the State's police power.[102]

Unfortunately, except as noted, sufficient data to properly evaluate the seriousness of the helmet problem is apparently not available in the legislative materials;[103] the figures are not classified into distinct categories. Based on the information given, however, it is probable that fatalities attributed to motorcycles are about 2,500 per year,[104] with an annual increase of 50% anticipated. Although this figure is comparable to accidental deaths caused by firearms, machin-

101 Prosser, *Law of Torts* § 24 at 127 (3d ed. 1964) (examples given: "Thus one who dynamites a house to stop the spread of a conflagration that threatens a town, . . . or, in time of war, destroys property which should not be allowed to fall into hands of the enemy, is not liable to the owner, so long as the emergency is great enough, and he has acted reasonably under the circumstances." *Id.* at 127-28).

102 State v. Anderson, 164 S.E.2d 48, 50 (N.C. App. 1968).

103 *See*, 23 U.S.C.A. § 402(a) (Supp. 1967); *Fed. Safety Acts of 1966*, CCH REP. ¶ 4, suggesting that this lack of detailed information retards the development of highway safety generally and was therefore one of the goals of the act; *cf.* data cited in note 25, *supra*, and 1968 *World Almanac* 895.

104 This estimate was determined by projecting the data given in the Michigan Police summary, note 25, *supra* (Exhibit A to State's Brief in Davids) on a national scale as follows: 11.5 per 10,000 registrations times 1,915,000 registrations nationally (H.R. Doc. No. 138, 90-1 at 3), or about 2,200 fatalities; if the Michigan Police data for all vehicles, 5.2 per 10,000 registrations, is multiplied by 90 million, the total number of vehicle registrations in the U.S. (*Fed. Safety Acts of 1966*, CCH REP. ¶ 1) the result is circa 47,000 which is roughly comparable to the actual national figure. Thus, the 2,500 figure is reasonably accurate enough for illustrative purposes, and places in its proper perspective the language used by the Secretary of Transportation in his report.

ery, and like hazards,[105] it must be pointed out that the *rates of increase* are radically different, *i.e.*, the latter being fairly constant,[106] while the former allegedly doubles every 2 years.[107] Perhaps, all factors considered, this fact might be sufficient to characterize the problem as a "public disaster" of "grave dimensions." If so, then the statute ought to be upheld, but only on *that* basis. The same rationale might apply to analogous situations. If so many people are injured in skiing accidents as compared with other sports, then the legislature may be justified in taking appropriate action due to a "public necessity." It is at least a more plausible basis for sustaining the regulation and it does tend to give some realistic content to the "viability of the state" argument.

No doubt, the proposed "public necessity" exception to what should otherwise be the general rule has some inherent limitations. Many of the weaknesses of the "welfare costs" approach would seemingly apply here. A court would have to decide at what point a "public necessity" exists so that the exception replaces the rule and the power to regulate attaches. Whether this point would be a fixed amount, like 10,000 deaths and injuries or a fixed percentage of the affected population, or a varying scale depending upon the subject matter involved, would depend upon the facts in each case. Judges are frequently compelled to draw such lines in order to prevent the exceptions from engulfing a rule. Also there is a very difficult theoretical aspect to this proposal. It might be argued that, if the state has no power to force a few cyclists to wear a helmet, how can that power come into play once many decide to ride without a helmet. Maybe in the long run this proposal has no validity. But at least, with the possible rise of self-protective laws, the argument ought to be explored.

IV. The Significance of the Helmet Litigation

A. *A More Workable Standard of "Reasonableness"*

The brief comparisons made earlier between "morality" laws, anti-suicide statutes, and the helmet requirement do illustrate a very important point. They show the difficulty that a trial judge encounters when confronted with cases of this kind, particularly in clarifying the nebulous assertions that are often made and in identifying the interests that are ultimately at stake. Perhaps, the value to be de-

105 1968 *World Almanac* 895 (firearms 2600; machinery 2100, etc.).

106 *Id.*

107 *See*, note 22, *supra*, and accompanying text.

rived from the helmet cases is the emphasis placed on the *injury* which the public is alleged to suffer when laws of this type are challenged. The cyclists' argument tends to minimize the "battle of labels." It tends to demand factual analysis similar to that called for in Justice Hall's famous dissent in *Vickers v. Township Committee of Gloucester Township.*

> While it has long been conventional for courts to test the validity of local legislation by the criterion of whether a fairly debatable issue is presented, and if so to sustain it, it makes all the difference in the world how a court deals with that criterion. Proper judicial review to me can be nothing less than an objective, realistic consideration of the setting—the evils or conditions sought to be remedied, a full and comparative appraisal of the public interest involved and the private rights affected, both from the local and broader aspects, and a thorough weighing of all factors, with government entitled to win if the scales are at least balanced or even a little less so. Of course such a process involves judgment and the measurement can never be mathematically exact. But that is what judges are for—to evaluate and protect all interests, including those of individuals and minorities, regardless of personal likes or views of wisdom, and not merely to rubber stamp governmental action in a kind of judicial *laissez-faire.* The majority approach attaches exclusive significance to the view of the governing body that, in its summary opinion, the "welfare" of the municipality would be advanced. On this criterion it is hard to conceive of any local action which would not come within the "debatable" class.[108]

Thus it may even lead to a more workable standard for dealing with due process issues on a lower court level. A comparison of the helmet requirement with the situation presented in *Griswold v. Connecticut*[109] should serve to illustrate the point.

In commenting on the *Griswold* case, and on the ninth amendment generally, many writers have urged the United States Supreme Court to distinguish between "economic" and "personal" due process cases.[110] But, as Justice Black has intimated, that distinction can often be rather artificial.[111] A man's money, goods or job can be just as "personal" to him as his privacy and pleasures, if not more so. Yet as others have also pointed out, Black's "specific constitutional guar-

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108 37 N.J. 232, 260, 181 A.2d 129, 144 (1962).

109 381 U.S. 479 (1965).

110 *E.g., see,* Emerson, 64 MICH. L. REV. 219; Dixon, 64 MICH. L. REV. 197; Van Loan, 48 B.U.L. REV. 1; Hogan, 54 A.B.A.J. 570. *See also* Ratner, 116 U. PA. L. REV. 1048.

111 Griswold v. Connecticut, 381 U.S. 479, 508-09 (1965) (Black J., dissenting).

antees" are hardly more definite or easily applied than Harlan's "fundamental fairness" or Douglas' "penumbral rights of privacy."[112] Thus, it is no mean task for a trial court to determine whether the claim asserted, as in the helmet cases, is ". . . of the very essence of a scheme of ordered liberty . . ."[113] or is included within the ambit of a "penumbral right."[114] These terms are conclusory and reflect only the ultimate disposition of a given claim. They are not clear, accurate tests to guide the lower courts in ruling on different though related claims.[115] But the emphasis on injury advocated by the cyclists might provide such a test. If, for instance, a trial judge, when confronted with a case like *Griswold,* were to focus on the problem of how other Connecticut citizens might be affected by the conduct proscribed, he might be able to perceive that no immediate, identifiable threat to their well-being could result from that conduct. If he were then to require the state to demonstrate some substantial benefit to the public at large by enforcement of the prohibition involved, he might have some realistic basis for concluding that no valid social purpose was promoted by the regulation.[116] With such a due process standard, he might be able to more accurately predict what the result would be on appeal. Perhaps, if such an approach had been taken in *Griswold,* it would have obviated the plethora of opinions generated by that case.

In the helmet cases, the controversy does focus on the public interest; in *Griswold,* this was assumed without consideration. Perhaps, in a nation saturated with publicity on the connection between individual family planning and societal well being, this specific could hardly have loomed large in the dispute. Later analyses may well suggest that such a relationship is less than obvious. In any event, to properly apply the rationality test in its traditional form in the *Griswold* situation is a very complex undertaking. A lower court must embark on an extensive evaluation of medical evidence and sexual practices to determine whether the "means" relates to the "ends" sought. To some extent, it must also pass on the suitability of the end itself, *i.e.,* to decide whether or not it is a socially desirable one. On the other hand, the emphasis on injury may obviate the need for some of this. Compare, for example, the controversy in *Tinker v.*

112. *Compare* opinions of Douglas, Harlan, and Black, *Id. See,* Kauper, 64 MICH. L. REV. 235, 255-58. *See generally, Ratner,* 116 U. PA. L. REV. 1048.

113 Palko v. Connecticut, 302 U.S. 319, 325 (1937).

114 Griswold v. Connecticut, 381 U.S. 479 (1965).

115 Ratner, 116 U. PA. L. REV. 1048, 1057.

116 *Cf.* MODEL PENAL CODE's position in text accompanying note 91, *supra.*

Des Moines Independent Community School District[117] over the wearing of a black armband in protest against the Viet Nam war. In that case, the disputants concentrate primarily on the factual issue of whether or not protest symbols actually disrupt classroom procedure.[118] This is a good application of the approach suggested. Thus, it should become evident that many lower courts are unable to adequately perform the complex task required of them by the traditional "reasonableness" test, especially in the type of cases herein discussed. Often, they must of necessity apply the presumption of constitutionality even though they might suspect that it is not applicable. It is suggested that the helmet litigation provides the opportunity to refine thinking in this area. The argument merits more attention than has been given it.

B. *Precedential Implications of the Helmet Decision*

The helmet requirement seems to exemplify an increasing tendency of modern governmental agencies to intervene into the minutiae of human activity. The *Tinker* dispute over the wearing of black armbands is a classic example. One cannot help but doubt the value of spending time, money, and effort to resolve the question of whether high school students may wear black armbands. Another example is the case of *People v. Stover*.[119] After almost three years of legislation and litigation, it was finally decided that Rye, New York, could keep an intractable but otherwise apparently harmless old man from hanging rags on a clothesline in his own front yard. Many of the situations discussed above also could be placed in this category. There are many such cases.[120]

The approach suggested by the cyclists may provide a palatable method of dealing with such issues. As intimated above, to punish behavior that demonstrably affects no one might be viewed as a very inefficient use of the criminal justice system. In the first place, it cannot be gainsaid that this society attaches considerable importance to recreational activities. One who might characterize the cyclists' complaint as trivial might react otherwise to any curtailment of his favorite sport. Such laws tend to offend many people, and yet, by hy-

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117 258 F. Supp. 971, *aff'd per curiam by equally divided court*, 383 F.2d 988 (8th Cir., 1967), *cert. granted*, 390 U.S. 942 (1968). [*rev'd*, 89 S. Ct. 733 (1969)—Ed.]

118 Briefs for Appellants and Appellee, *Id.*

119 12 N.Y.2d 462, 191 N.E.2d 272, 240 N.Y.S.2d 734, *app. dismissed*, 375 U.S. 42 (1963). (Dr. Stover eventually served 30 days for this crime, N.Y. Times, Jan. 16, 1964, at 46, col. 2.)

120 *E.g.*, Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied*, 393 U.S. 856 (1968); Reid v. Architectural Board of Review, 119 O. App. 67, 192 N.E.2d 74 (1963).

pothesis, they produce no corresponding benefit to others. Moreover, the emotional fervor pervading the policies behind such laws often tends to distort the issues and obfuscate interests that are really at stake. The wearing of a helmet, for example, is a relative matter. Most sensible individuals would wear one on a road trip, but decline to do so on a short jaunt about the neighborhood. To the cyclists, such a decision should be left to his own discretion, not to state law. In addition, the emphasis on such measures tends to complicate the policeman's already complex job. With so many rules to enforce, the law officer cannot help but concentrate on only those infractions which he actually observes. And even after enforcement, society has gained little thereby, when no demonstrable need for the regulation has been established.

V. Conclusion

To depreciate or ignore the principle advocated is to enervate a most venerated tenet. Acceptance of reasons behind a law is usually thought to encourage obedience to it. And however valid that may be, certainly the converse is not true. Only a passing reference to this nation's experience under prohibition should dramatize the point. It is not only in keeping with firmly held notions about the nature of an open society, but it is also crucial to the effective administration of justice. The very essence of due process would seem to demand it. Moreover, it is perhaps not an inaccurate estimate of public opinion to say that most people believe in this idea. The mere fact that the *Model Penal Code*, the Attorney-General of New Mexico, and 8 lower court judges so held is evidence of the continuing vitality of the principle. Thus, in dealing with a self-protective law, a court ought not adopt the normally sanguine view that "safety" laws are invariably "beneficial."[121] The subject ought to be examined in more detail than that heretofore given it. No one should be convicted on a mere presumption of wrongdoing.

Kenneth M. Royalty

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121 *Cf.* Olmstead v. United States, 277 U.S. 438, 471 (1928) (Brandeis J., dissenting).

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning, but without understanding. . . . The makers of the Constitution . . . sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and right most valued by civilized man.

Id. at 479, 478.